IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 04/02/2004

Coram

The Honourable Mr. B. SUBHASHAN REDDY, Chief Justice
and
The Honourable Mr. Justice S. SARDAR ZACKRIA HUSSAIN

W.P. Nos.1238 of 2004,WP.1239 of 2004 ,WP. 1240 of 2004
and W.P.M.P. Nos.1297 to 1299 of 2004

W.P. No.1238 of 2004

The Government of Tamil Nadu
Rep. by its Chief Secretary,
Fort St. George,
CHENNAI - 600 009. ... Petitioner

Vs.

1. Union of India,
Rep. by its Secretary,
Ministry of Law & Justice,
New Delhi.

2. Review Committee on POTA
through its Secretary,
Room No.246, Vigyan Bhavan Annexe,
New Delhi.

3. R.R. Gopal
105, Jani Jahankhan Street,
Royapettah, Chennai - 14.

4. T.R. Balu
Member of Parliament,
10, Raisina Road, New Delhi - 1.
5. Thiru A. Kamaraj,
Associate Editor,
Nakkeeran,
105, Jani Jahankhan Street,
Royapettah, Chennai - 14.

6. Thiru S. Ramanathan, F/o R.R. Gopal,
105, Jani Jahankhan Street,
Royapettah, Chennai - 14.

7. Thiru. Vaiko

(Now confined at Central Prison, Vellore)

8. Thiru. Madurai Ganesan,
S/o Perisamy,
Compounder Thoppu,
Madurai.

9. Thiru. Alagusundaram,
s/o Kandasamy,
No.30, Palani Andavar Koil Street,
Thiruparamkundram,
Madurai.

10. Thiru Ganesa Murthy,
S/o Avinasi Gounder,
H-45, Periyar Nagar,
Erode.

11. Thiru Veera Ilavarasan,
S/o Veerappan,
Pallapatti Post,
Melur Taluk, Madurai Dist.

12. Thiru Bhoominathan,
S/o Muniyandi,
786, Karpagam Nagar,
K. Pudur, Madurai.

13. Thiru P.S. Maniyan,
S/o Palaniappan,
Melachinnanampatti,
Kalvelipatti, Thanichujam,
Vadapatti PS Limits.

14. Thiru Sivanthiappan,
S/o Sethuraman,
4-A, 8th South Extension,
Subramanyapuram,
Karaikudi, Sivagangai Dist.

15. Thiru Nagarajan,
S/o Kandasamy Naidu,
25-B/4, Kamarajapuram North,
Thirumangalam,
Madurai Dist.

16. Gingee Ramachandran,
No.48, Lodhi Estate,
New Delhi - 3. ... Respondents

W.P. No.1239 of 2004
The Government of Tamil Nadu
Rep. by its Chief Secretary,
Fort St. George,
CHENNAI - 600 009. ... Petitioner

Vs.

1. Union of India,
Rep. by its Secretary,
Ministry of Law & Justice,
New Delhi.

2. Review Committee on POTA
through its Secretary,
Room No.246, Vigyan Bhavan Annexe,
New Delhi.
3. Thiru Vaiko,
AL-20, 4th Cross St., 11th Main Road,
Anna Nagar, Chennai - 40
(Now confined in Central Prison, Vellore)

4. Thiru. Madurai Ganesan,
S/o Perisamy,
Compounder Thoppu,
Madurai.

5. Thiru. Alagusundaram,
s/o Kandasamy,
No.30, Palani Andavar Koil Street,
Thiruparamkundram,
Madurai.

6. Thiru Ganesa Murthy,
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H-45, Periyar Nagar,
Erode.

7. Thiru Veera Ilavarasan,
S/o Veerappan, Pallapatti Post,
Melur Taluk, Madurai Dist.

8. Thiru Bhoominathan,
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786, Karpagam Nagar, K. Pudur, Madurai.

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S/o Palaniappan,
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Kalvelipatti, Thanichujam,
Vadapatti PS Limits.

10. Thiru Sivanthiappan,
S/o Sethuraman,
4-A, 8th South Extension,
Subramanyapuram,
Karaikudi, Sivagangai Dist.
11. Thiru Nagarajan,
S/o Kandasamy Naidu,
25-B/4, Kamarajapuram North,
Thirumangalam,
Madurai Dist.

12. Gingee Ramachandran,
No.35, Subbaraya Gounder Street,
Gingee, Villupuram Dist. ... Respondents
W.P. No.1240 of 2004
The Government of Tamil Nadu
Rep. by its Chief Secretary,
Fort St. George,
CHENNAI - 600 009. ... Petitioner

Vs.

1. Union of India,
Rep. by its Secretary,
Ministry of Law & Justice,
New Delhi.

2. Review Committee on POTA
through its Secretary,
Room No.246, Vigyan Bhavan Annexe,
New Delhi.

3. R.R. Gopal
105, Jani Jahankhan Street,
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Member of Parliament,
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105, Jani Jahankhan Street, Royapettah, Chennai - 14.

6. Thiru S. Ramanathan, F/o R.R. Gopal,
105, Jani Jahankhan Street,
Royapettah, Chennai - 14. ... Respondents

Petitions under Article 226 of Constitution of India for the
issuance of Writs of Certiorari for the reasons stated therein.

For Petitioner : Mr. C.S. Vaidyanathan,
Sr. Counsel, assisted by
Mr. I. Subramanian, PP
Mr. V. Raghupathi, GP
Mr. S. Jayakumar, Addl. PP
and
Mr. C. Manishankar, Spl. PP

For 2nd Respondent : Mr. V.T. Gopalan, Addl. S.G.
For Mr. P. Wilson, ACGSC

For 7th Respondent in W.P.No. : Mr. K. Chandru, S.C. for
1238/04 and 3rd Respondent in Mr. Yashod Varadhan
1239/04

For 3rd Respondent in W.P. : Mr. R. Shanmugasundaram,
Nos.1238 and 1240 of 2004 Sr. Counsel for M/s.NR Elango

:O R D E R

THE HONOURABLE THE CHIEF JUSTICE

In Writ Petition No.1238 of 2004, the constitutionality of sub-
Sections 4, 5, 6 and 7 of Section 60 of Prevention of Terrorism (Amendment) Act, 2003 (Central Act 4 of 2004) is questioned.
hereinafter referred to as "POTA - 2004". The same was preceded by
the Prevention of Terrorism (Amendment) Ordinance, 2003, promulgated
on 27.10.2003. The said Ordinance was replaced by POTA - 2004. In
the Ordinance, sub-Section (7) was not there, but, was added when the
Bill was presented, which transformed into Act on the assent of the
President on 2.1.2004. POTA-2004 is given retrospective effect from 27.10.2003 i.e. the date of issuance of the Ordinance.

2. POTA was first enacted in the year 2002, which was also preceded by an Ordinance. POTA was enacted to contain terrorism
incidental acts thereto and, in fact, has been modelled on the Terrorists and Disruptive Activities (Prevention) Act, 1987, h
referred to as "TADA". As the tenure was fixed for such enactments
starting from 1984, the Central Government thought it necessary to enact
laws from time to time to contain terrorism, which is on the rise every
time and which has now assumed alarming proportions. The
constitutionality of TADA was first challenged and the leading case on the
subject is KARTAR SINGH v. STATE OF PUNJAB (1994) 3 SCC 569). Excepting
Section 22 of the Act, all the provisions of TADA were upheld.
Judgment was rendered by a Constitution Bench of the Supreme Court. While
upholding the validity of TADA, except Section 22 thereof, the
Supreme Court in the above case held in paragraph 265 as hereunder:

"In order to ensure higher level of scrutiny and applicability of
TADA Act, there must be a screening Committee or a Review Committee

constituted by the Central Government consisting of the Home Secretary, Law Secretary and other secretaries concerned of the various Departments to review all the TADA cases instituted by the Central Government as well as to have a quarterly administrative r
States' action in the application of the TADA provisions in the respective States, and the incidental questions arising in relation thereto. Similarly, there must be a Screening or Review Committee at the State level constituted by the respective States consisting of the Chief Secretary, Home Secretary, Law Secretary, Director General of Police (Law and Order) and other officials as the respective Government may think it fit, to review the action of the enforcing authorities under the Act and screen the cases registered under the provisions of the Act and decide the further course of action in every matter and so on".

3. In compliance with the same, the Screening Committees or Review Committees, by whatever name called, have been constitut
terrorism attracting the said Special Act containing harsh measures. Once the Committee takes a view that it was not a case under TADA, then the option was to deal with the same in ordinary Criminal law, if the facts and circumstances so warrant. The above Supreme Court judgment speaks of high-level officers of the Central Government or the State Government, as the case may be. But, in the later judgment, in SHAHEEN WELFARE ASSOCIATION v. UNION OF INDIA (1996) 2 SCC 616), the Supreme Court opined that a more independent and objective scrutiny of TADA cases
by a Committee headed by a retired Judge is obviously necessary. Presumably, the Central Government has taken into consideration all these statements of law made by the Supreme Court, as, while enacting POTA-2002, it had incorporated provisions in Section 60, which read:

"(1) The Central Government and each State Government, shall whenever necessary, constitute one or more Review Committees for the purposes of this Act.

(2) Every such Committee shall consist of a Chairperson and such other members not exceeding three and possessing such qualifications as may be prescribed.

(3) A Chairperson of the Committee shall be a person, who is, or who has been, a Judge of a High Court, who shall be appointe
Central Government, or as the case may be, the State Government, so however, that the concurrence of the Chief Justice of the High Court shall be obtained in the case of a sitting Judge:

Provided that in the case of a Union Territory, the appointment of a person who is a Judge of the High Court of a State shall
a Chairperson with the concurrence of the Chief Justice of the concerned High Court."

4. The constitutionality of POTA - 2002 was questioned before the Supreme Court in Writ Petition (C) No.389 of 2002 and the said case was tried along with other similar matters in PEOPLE'S UNION FOR CIVIL LIBERTIES v. UNION OF INDIA (2004 (1) CTC 241). But the challenge was repelled upholding the validity of the Act by explaining the object and intendment of the Act. The purport of Section 21 interpreted but the merits of each individual case was left to be decided by the Designated Court notified for that purpose.

5. A notification was issued by the Central Government, in exercise of the power conferred on it by Section 60 of POTA - 200 3 constituting a Review Committee effective from the said date and the said Review Committee consisted of two members viz., one former IAS Officer and another former IPS Officer, who were of the rank of Secretaries to Government of India and a Chairperson, who is the former Chief Justice of High Court of Punjab and Haryana. It is pertinent to mention that the Principal Act of POTA - 2002 contained only provisions in Sections 19, 40 and 46, relating to Review Committee. Under Section 19, the Review Committee is empowered to deal with, on application by the aggrieved person or organization, the correctness or otherwise of inclusion of terrorist organization in the Schedule by the Central Government acting under Section 18. Under Section 40, the competent authority, after passing order in the preceding Section, is obliged to submit a copy of the same to the Review Committee. The other power of the Review Committee under Section 46 is to validity or otherwise of the plea of interception of oral, electronic and wire communication by person/persons, who were susp terrorists or connected with the said activities. The functions of the Review Committee either under Section 19, 40 or 46 of the POTA are questions apart in this writ petition.

6. On 27.10.2003, an Ordinance (POTO - 2003) was promulgated inserting sub-Sections 4, 5, and 6 in main Section 60 of POTA - 2002, which read,

"(4) Without prejudice to the other provisions of this Act, any Review Committee constituted under sub-Section (1) shall, on an application by any aggrieved person, review whether there is a prima facie case for proceeding against the accused under this Act and issue directions accordingly.

(5) Any direction issued under sub-Section (4) -

(i) by the Review Committee constituted by the Central Government shall be binding on the Central Government, the State Government and the police officer investigating the offence; and

(ii) by the Review Committee constituted by the State Government shall be binding on the State Government and the police officer investigating the offence.

(6) Where the reviews under sub-Section (4) relating to the same

offence under this Act, have been made by a Review Committee constituted by the Central Government and a Review Committee con
State Government under sub-Section (1), any direction issued by the Review Committee constituted by the Central Government shall prevail".

Acting upon the above incorporated sub-Sections, the Review Committee has issued show-cause notices dated 14.11.2003 to the State of Tamil Nadu relating to the cases instituted under POTA against M/s.Vaiko, R.R. Gopal alias Nakkiran, M. Ganesan, K. Azhagu Su
Ilavarasan, M. Bhoominathan, P.S. Maniyan, S. Sivanthiyappan, K. Nagarajan, and A. Ganesh Murthy. The sum and substance of the show-cause notices is that complaints have been made that the above persons have been unduly prosecuted by drubbing them as terrorists under POTA and that the actions of the State Government have been called to be reviewed and consequentially, notice was being issued calling upon the State Government to file a reply. We feel it apt to extract the said material portion of the show-cause notice, whose contents are the same in all the cases and which reads thus:
"Now, you are hereby required to show cause whether there is a fit case for proceeding against the abovenamed accused under POTA. Also take notice that you are required to cause appearance, through authorized representative, accompanied by the Investigating Officer/Pairavi Officer (duly conversant with the case), and produce the entire records of the Investigating Agency pertain to the case, inclusive of case diary/police diaries and such other material as ma
registration of the FIR and to the grant of sanction for prosecution under POTA. The records and documents must be produced with four sets of copies and wherever they are in vernacular, accompanied by English translation thereof. The required material be produced in the office of the Review Committee at the address captioned above on or before 2nd December 2003."

Preliminary objections were preferred by the writ petitioner questioning the jurisdiction of the Review Committee. Emphasis was laid on the pendency of the cases before the Designated Court and also the High Court and the Apex Court and that the proceedings by the Review Committee tend to interfere in the said judicial process and is an encroachment on the judicial power of the State. It was also the stand of the petitioner that after the registration of FIR, investigation into the crime alleged, and according of sanction under Section 50 of the Act and filing of the charge-sheet and taking cognizance of the same and framing of charges and when the case is at the part-heard stage after the examination of several prosecution witnesses, the Review Committee has got no jurisdiction to undo everything and then annul the proceedings, thus making them non est under law. The apprehensions of law and order problem in the event of the intervention of the Review Committee were also highlighted. However, the petitioner State Government reserved its right to file a detailed report subject to the outcome of the consideration of the preliminary objections.

7. The petitioner-State Government somehow felt that preliminary objections would not be considered by the Review Committee and then moved this Court by filing Writ Petition Nos.35749 and 35750 of 2003. The learned Additional Solicitor General, after getting instructions, reported before the learned single Judge that the Review Committee will decide the preliminary objection first and only thereafter, depending on the outcome, proceed further with merits of the complaints lodged before them. The learned single Judge recorded the statement of the learned Additional Solicitor General and disposed of the writ petitions on the basis of the above undertaking making it specific that all other contentions and issues raised are left open to be decided either by the Review Committee or later by the Appropriate Authority basing upon the findings of the Review Committee.

8. Pursuant to the said order, the Review Committee has heard on the preliminary objections raised by the petitioner. The objections raised by the petitioner were to the same effect that the Review Committee would not be entitled to sit in judgment over either the prosecuting agency's decision to prosecute, petitioner's sanction under Section 50 of the Act, investigation, the framing of the charges, negation of the plea of discharge of the accused by the Des
that Review Committee cannot assume the role of judicial authority and impose its judgment either on the power exercised by the State Government or its officials or the proceedings of the Court and more so, after the Designated Court formed its prima facie opinion that there exists grounds for trying the accused by framing charges. A ground was also taken that even if the newly incorporated sub-sections in Section 60 are held to be valid, then they can be applied only to the proceedings initiated after the amendment and not to the instant cases which were already booked under pre-amended provisions and are in part-heard trial stage. The Review Committee heard these objections and by order dated 23.1.2004, repelled the same holding that it has got jurisdiction to review as to whether there exists element of terrorism in the accusation so as to attract POTA and that the p
incorporated in POTA after amendment can be applied to the pending proceedings and that their decision will not amount to encroachment on the judicial power of the State. The Review Committee also expressed its view that being a Central Legislation, the Central Gove
got powers to set up the Review Committee and Review Committee is not a parallel body to the judicial authority, but is only
administrative authority to review the decision of the Executive Government. The Committee has referred to several decisions
paragraph 46 of the order stating, 'The matter of withdrawal from prosecution involves administrative action by a functionary of the State Government. It is not precluded by any law merely on account of earlier grant of sanction for prosecution by the State. In the event of the Review Committee coming to a conclusion that there is no prima facie case for proceeding against the accused under POTA in a case which may be pending trail in court, suitable direction may be i
nature of "revised opinion" as per the law laid down in R.M. TIWARI's case (referred supra) and the State of Tamil Nadu was not able to

show anything to interdict review by the Committee and it would be wrong to construe the show cause notice as a process that
interference with the course of justice and the hierarchy of courts
would proceed with the matters brought before them unhindered by the
course of administrative review." Then the Review Committee has
indicated that the cases will be taken up on the basis of available material for further consideration after final hearing, w
on 4th, 5th and 6th February, 2004 at New Delhi. W.P. Nos.1239 and 124
0 of 2004 are filed by the Government of Tamil Nadu to call for the
records pertaining to the proceedings of the second respondent ending with the order dated 23.1.2004 and quash the same.

9. Mr. C.S. Vaidyanathan, learned senior counsel, appeared for the
petitioner-State Government, while Mr. V.T. Gopalan, learned
Additional Solicitor General, appeared for the first respondent Central
Government, Mr.R.Shanmugasundaram, learned senior counsel, appeared for
the third respondent in W.P. Nos.1238 and 1240 of 2004 i.e. Mr. R.R.
Gopal alias Mr. Nakkiran Gopal and Mr. K. Chandru, learned senior
counsel, appeared for Mr. Vaiko, the seventh respondent in W.P. No.1238 of 2004 and third respondent in W.P. No.1239 of 2004.
10. (a) It is contended by Mr. C.S. Vaidyanathan, learned senior
counsel, on behalf of the petitioner-State Government that the
provisions contained in sub-Sections 4 to 7 of Section 60 of POTA are
unconstitutional as they encroach upon the judicial power of the State and
as the investigation was already completed, charge sheet filed,
offence taken cognizance of, charges framed and trial is in progress after
rejecting the plea of discharge, the Review Committee cannot sit as a parallel judicial body and try to adjudicate regarding
encroaching on the judicial power of the State, thus violating the
constitutional scheme. It is also submitted that in any event, the above
exercise, even if permissible under the Constitution, can be made in cases
to be filed afresh and not to the pending proceedings like the instant one.

(b) Mr. V.T. Gopalan, learned Additional Solicitor General,
appearing for the Union of India, has raised the preliminary objection on
the maintainability of the writ petitions on the ground that the
dispute raised is one triable by the Supreme Court under Article 131 of the Constitution of India and by reason of that, Arti
inapplicable and that, in any event, the setting up of Review Committees like the instant one, is not alien to the statute de
activities and the impugned statutory provisions are intra vires the
Constitution. The learned Additional Solicitor General further
submits that POTA, with its amendments, reflects the wisdom and will of the Parliament and is unassailable and the Courts are
going into the question of the wisdom and will of the Parliament. It is
further submitted that the amended provisions are applicable not only to the fresh proceedings initiated after the enactment
amended provisions but also applicable to the pending proceedings like the
present one. The learned Additional Solicitor General also submits
that sub-Section (7) to Section 60 of POTA is akin to sub-Section (3)
of Section 195 of Code of Criminal Procedure.

(c) Mr. K. Chandru, learned senior counsel, appearing for the third respondent in W.P. No.1239 of 2004 and Mr. R. Shanmugasundaram, learned counsel, appearing for the third respondent in W.P. Nos.1238 and 1240 of 2004, support the argument of Mr. V.T. Gopal petitions are not maintainable. They further submit that the Review Committee has got jurisdiction to go into the validity of the proceedings under POTA. They submitted that the functions entrusted to the Review Committee do not encroach upon the judicial power of the State and until conclusion of the prosecution launched agains the harshness of the provisions of POTA and on the analogy of TADA, the constitutional validity of which was upheld, and basing on the judgments of Supreme Court, periodical reviews can always be made by the Review Committees set up and there is nothing wrong in the Review Committee appointed in the instant cases going into the applicability or otherwise of POTA to the accusations made in the instant case and more particularly in view of the judgment of the Supreme Court in the case of PEOPLES' UNION OF CIVIL LIBERTIES (supra). It is further submitted that the criminal case is deemed to be pending until judgment is delivered and mere framing of the charge and even progress in trial cannot stand in the way of withdrawing the proceedings and in this connection, cited Section 321 of Code of Criminal Procedure, which permits the withdrawal.

11. In view of the rival contentions, issues arising for consideration are:

(i) Whether the Writ Petitions are maintainable in view of Article 1 31 of the Constitution of India?

(ii) Whether the impugned statutory provisions are applicable to the pending proceedings?

(iii) Whether the setting up of Review Committee results in encroachment of judicial power of the State?

(iv) Whether the impugned order passed by the Review Committee rejecting the preliminary objections raised by the petitioner - State Government is sustainable?

ISSUE (i) - ARTICLE 131 OF CONSTITUTION OF INDIA

12. (a) The contentions of M/s. V.T. Gopalan, K. Chandru and R. Shanmugasundaram, learned counsel appearing for the respondents, are that as the State Government is the writ petitioner challenging the provisions of POTA enacted by the Central Government and also the jurisdiction of the Review Committee set up by the Central Government, the lis is essentially between the State Government and the Central Government and the only remedy is to invoke the jurisdiction of the Supreme Court under Article 131 of Constitution of India invocation of power of judicial review of this Court under Article 226 of Constitution of India. In support of their argumen cited the judgment of the Supreme Court in STATE OF KARNATAKA v. UNION OF INDIA (1977) 4 SCC 608) and judgments rendered by a Full Bench

of Punjab & Haryana High Court in STATE OF PUNJAB v. UNION OF INDIA (AIR 1971 P & H 155) and a Division Bench judgment of the Gujarat High Court in BABUBHAI JASHBHAI PATEL v. UNION OF INDIA (AIR 1983 Guj. 1). Countering the above arguments, Mr. C.S. Vaidyanathan, senior counsel appearing for the petitioner - State Government has submitted that even though the petitioner - State Government has filed the writ petitions, they are only questioning the provisions of the Central Act in the context of the constitutional scheme and particularly on the question of encroaching the judicial powers of the State and that in any event, as the parties are not only the State Government and the Central Government but as there are private indiv legal proposition applicable is one rendered by the Supreme Court in STATE OF BIHAR v. UNION OF INDIA (1970 (1) SCC 67) and UNION OF INDIA v. STATE OF RAJASTHAN (1984) 4 SCC 238). Mr. V.T. Gopa that private individuals impleaded are not necessary parties and their presence should be ignored, that this Court should assume that the lis is inter se only the State Government and the Central Government and that the Writ Petitions should be dismissed as not maintainable under Article 226 of Constitution of India.

(b) Article 131 of Indian Constitution confers exclusive power on the Supreme Court to exercise original jurisdiction in any dispute between the Government of India and one or more States or between the Government of India and any State or States on the one side and one or more other States on the other side or between two or more States. But it is not each and every kind of dispute between the above disputants that Supreme Court tries exclusively on its Original Side. The resolution of dispute is confined to only such questions whether on law or on fact on which the existence or extent of a lega relations or inter-State relations. Such are the kinds of disputes which arose for consideration in the decisions cited on behalf of the respondents. The dispute in STATE OF PUNJAB v. UNION OF INDIA (supra) deals with regard to the right of the Central Government to impose tax on agricultural income, while in the case of BABUBHAI JASHBHAI PATEL v. UNION OF INDIA (supra), it is the quantum of royalty payable by the Central Government to the State Government. In the constitutional Bench judgment of the Supreme Court in STATE OF KARNA OF INDIA (supra), it is with regard to the right to set up a Commission by the Central Government against the Chief Ministers and other Ministers of Karnataka Government exercising the powers under the Commission of Enquiries Act, 1952. Such is not the situation in the instant case. The dispute is not with regard to existence or extent of any right of the Central Government. The dispute rai to powers of Review Committee to enquire into the correctness of prosecution, sanction, investigation and right to proceed further with legal proceedings before the Special Court on the ground that such exercise interferes with the judicial proceedings. In fact, that is the only argument advanced by Mr. C.S. Vaidyanathan, learned senior counsel appearing for the petitioner - State Government. That apart, in all the judgments cited on behalf of the petitioner or the respondents, there is no dispute about the proposition that if any

person is there, then Article 131 of Constitution of India is not
applicable. In BABUBHAI JASHBHAI PATEL v. UNION OF INDIA (supra), the former Chief Minister and the Leader of Opposition fil
questioning the quantum of royalty payable by the Central Government
to the State of Gujarat. It was held that Article 131 of
Constitution cannot be avoided merely because the State is not a strictly a
party but projected private individuals to raise a question in the guise
of a Public Interest Litigation. In the instant case, there is no
basis to say that the private individuals, who are the accused are not necessary parties to this petition. The necessary par
subject matter. May be the private respondents, other than the accused
respondents, are not necessary parties as they are not affected
personally. But the accused respondents are the only really interested and affected parties without whose impleadment, the w
cannot be maintainable as it would be hit by non-joinder of necessary
parties. In view of this fact situation and the legal propositions
enunciated by the Supreme Court in STATE OF BIHAR v. UNION OF INDIA (supra), this writ petition is maintainable. That apart,
petitions Central Review Committee is also a necessary party and as such
has been impleaded and the Central Review Committee cannot be termed
as the Central Government. This view of ours is fortified by the
decision of the Supreme Court in UNION OF INDIA v. STATE OF RAJASTHAN (
supra). Further, the challenge is to the constitutionality of the
provisions introduced by amendment in POTA 2004 and such challenge is
entertainable for adjudication under Article 226 of Constitution. In
this context, it is relevant to refer to Constitution (42nd Amendment)
Act, 1976, which was enacted creating a bar on the High Courts, by
inserting Section 226-A, from deciding the validity of Central Laws,
under Article 226 of the Constitution, and vesting the said power
solely with the Supreme Court by introducing Article 131-A. But the said
constitutional embargo was lifted by enacting Constitution (43rd
Amendment) Act, 1977 repealing Articles 131-A and 226-A. That is a clear indication that High Courts can entertain the chall
State Laws but also Central Laws. For these reasons, the bar of
jurisdiction of this Court pleaded by the respondents fails and is
accordingly rejected holding that the writ petitions are maintainable. Now, we proceed to adjudicate on the other points.

ISSUE (ii) - APPLICABILITY OF STATUTORY PROVISIONS TO THE PENDING PROCEEDINGS

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13. No doubt when POTA 2002 was enacted, Section 60 contained only
three sub-Sections. By that time, the Review Committee could
adjudicate the matters only under Sections 19 and 46 of the Act. But that
does not mean that the Act could not be amended by inserting some more provisions for effective implementation of the Act vis
constitutional safeguards and more particularly keeping in view the
pronouncement of the Supreme Court on the subject. Review Committees had to be set up because of directions of Supreme Court
mentioned. As the same was lost sight of at the time of enactment of POTA 2

002, the Parliament has brought in amendment incorporating the said provisions in sub-Sections (4) to (6) of Section 60 of POTA 2002. Setting up a Review Committee is perfectly in consonance with the law laid down by the Supreme Court and cannot be found fault with. Of course, when the show cause notice was issued, sub-Section (7) was not there as POTA - 2004 came into effect only from 2.1.2004 and sub-Section (7) of Section 60 of POTA can be made applicable only from 2.1.2004 . But sub-Section (7) of Section 60 does not create any new right other than those mentioned in its preceding sub-Sections (4) to (6). Sub-Section (7) is in the nature of explanation spelling out the effect of the exercise of the power in sub-Sections (4) to (6) and cannot be read independently by itself. The proceedings b Committee are still pending and only preliminary objections have been answered by order dated 23.1.2004. The judgment render Supreme Court in MATHEW M. THOMAS v. COMMISSIONER OF INCOME TAX (1999) 2 SCC 543) is an authority for the proposition that if provision is brought forth while a matter is pending, such provision shall be made applicable even to the pending proceedings and that proceedings are deemed to be pending even at the appellate stage. There was divergence of opinion among various High Courts. The High Courts of Madras, Andhra Pradesh, Delhi and Punjab & Haryana h statutory provisions enacted even while the case is pending, be it original, appellate, second appellate or revisional, are applicable as all the said proceedings are deemed to be pending. The dissenting view is that of the Kerala High Court. But the Supreme Court, in the above case, has overruled the view of the Kerala High Court by upholding the views of other High Courts mentioned above. As the prosecution is still pending against the accused respondent provisions are applicable. Then we go to the vital question of encroachment of judicial powers of the State.

ISSUE (iii) - WHETHER ENCROACHMENT OF JUDICIAL POWERS OF THE STATE

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14. (a) The wisdom and will of either the Parliament or the State Legislatures, which are reflected through their legislative policies, which, in turn, are translated into enactments, are valid so long as they remain unchallenged but once their constitutionality is questioned, the said Acts have to be scrutinized on the touchstone of constitutional provisions and limitations contained therein. In our constitutional scheme, there is a clear demarcation of legislative fields for Centre - exclusively in the List I, for States the State legislature to legislate either in the List II or List III is always subject to the power of Parliament to legislat within the legislative competence of the Parliament and this was unequivocally held by the Supreme Court in KARTAR SINGH's case (supra) and PEOPLES' UNION OF CIVIL LIBERTIES (supra), of which the second one is directly on the point. The petitioner - State Government is a donee of the power to exercise under POTA and cannot claim larger rights than delegated. It may have exclusive powers to legislate and take action in relation to 'police' and 'public order'. But the law relating to terrorism is within the realm of the Parliament. It is for the Central Government to identify a particular organization as a terrorist organization and then include

it in the Schedule unde
and if an application is filed by the aggrieved party, the Review Committee is entitled to make a scrutiny under Section 19 and if it is held that the organization cannot be termed as a terrorist organization, then the organization has to be deleted from the Sch
Government acts only subject to any organization being identified a terrorist organization and is included in the Schedule. If a particular organization is denotified from the Schedule under Section 19 of POTA, then the proceedings, even pending before the Court, automatically disappear. Then the only power of the Court is to act under Section 33 of the POTA. Similar is the situation in Section 46 of POTA. By this, it is clear that the role of the State Government is
prescribed in POTA and being a delegate, it cannot crave for more rights.
The decision whether a person is a terrorist or an organization is a terrorist organization is the exclusive privilege of the Central Government subject to review by the Review Committee and the State Government has no role to play in that regard. When a person is not a terrorist or an organization is not a terrorist organization, the State Government may have to invoke its powers under other laws as may be applicable but not under POTA.
(b) Now, the cases lodged against the accused/respondents under POTA are at part-heard trial stage. Eight witnesses have been examined on behalf of the prosecution and the time has been set by the High Court earlier in bail petitions, to conclude the trial by the end of June 2004. But that cannot stop the Review Committee from considering the matter as to the existence of the prima facie case regarding the applicability of POTA. The exercise of power by the Review Committee cannot be termed as scuttling the judicial process. In our constitutional scheme, the powers of legislature, executive and judiciary are earmarked and no organ can encroach on the powers of the other and every organ has to be within the limitations prescribed by the Constitution. We need not refer to several judicial precedents set by the Supreme Court on this point. Suffice it to refer the latest judgment of the Supreme Court in
BAKHTWAR TRUST v. M.D. NARAYANAN
remove the basis of a judgment but cannot annul a judgment. In a criminal case, which is cognizable, the court frames charge
of existence of prima facie case. But that is not a decision on merits. Even the negation of plea of discharge cannot be construed as a decision that accused are liable to be convicted. Criminal cases are deemed to be pending and can be concluded only on the d
judgment. Upto that stage, the prosecution can always be withdrawn subject to such limitations as are prescribed in Section 321 Code of Criminal Procedure. Of course, there is a difference in the stages of withdrawal. If withdrawal is made before framing of charge, the effect is discharge. But if it is made after framing of the
investigating officer has got no choice. But if the matter is brought to the notice of the Public Prosecutor and particularly from the State Government seeking withdrawal of prosecution, steps can be taken in that regard. A plea made to the Public Prosecutor to wit
proceedings cannot be construed as an encroachment on the judicial power.
At any stage before the pronouncement of the judgment in a criminal

case, the State Government can instruct the Public Prosecutor to
withdraw the prosecution. In POTA also, the State Government can exercise such power. But if it is not willing to do so, it
Review Committee exercising the powers under Section 60 thereof and
the Review Committee can always decide as to whether, in its opinion,
the case is a fit one to proceed further even if it is in part-heard
stage. If the Review Committee comes to the conclusion that the case is fit to be withdrawn from prosecution under POTA, it
the State Government, which, in turn, has to instruct the Public
Prosecutor to invoke Section 321 of Code of Criminal Procedure. The role
of Review Committee is limited only that far and no further. When
the role of the Review Committee ends, then it is for the Public
Prosecutor to apply his mind independently according to the well settled
legal principles interpreting Section 321 of Code of Criminal Procedure and ultimately it is for the Special Court trying the
decide whether the plea of the Public Prosecutor to withdraw the
prosecution, if made, is acceptable or not. The submissions of Mr.V.T.
Gopalan that sub-Section (2) with its proviso of Section 195 of Code of
Criminal Procedure has to be made applicable for withdrawing the
prosecution under POTA cannot be accepted. It is only Section 321 of Code
of Criminal Procedure, which is applicable for withdrawing prosecution under POTA. Hence, we hold that upto the stage of form
opinion regarding prima facie case under POTA, the Review Committee's
decision, one way or the other, cannot amount to interference in the
judicial process. We next proceed to the last point.

ISSUE (iv) - WHETHER THE IMPUGNED ORDER OF REVIEW COMMITTEE IS SUSTAINABLE

15.Review Committee held sittings and heard on the preliminary
objections addressed by the petitioner State Government. Objections
raised by the State Government have been detailed above and we need not
repeat the same. In view of our discussion on Issues (ii) and (iii),
there is no hesitation to hold that the Review Committee has been
validly constituted under POTA and that it is entitled to scrutinize the cases filed under POTA whether to proceed further in
prosecution relating to the accused, who are arrayed as respondents and
whose names have already been mentioned above. The Review Committee has rightly called for the records from the petitioner-S
and the latter cannot offer any resistance for production of the said records. But, by that, the State Government cannot be
the position of a subordinate to the Review Committee. State
Government is a sovereign power and is entitled to exercise its sovereign
functions in accordance with the Constitution. The Review Committee is a creature of a statute and is circumscribed by the l
placed thereunder. The submission of Mr. V.T. Gopalan to make the State
Government subservient to Review Committee cannot be countenanced.
The State Government is entitled to express its views by producing the records and they have got to be considered by the Revi
So far, the preliminary objections raised by the petitioner-State
Government regarding the authority of the Review Committee to examine
the prima facie case of prosecution have been overruled and rightly so. But there is no scope to

interpret the impugned prov
automatically entailing in withdrawal of proceedings de hors Section 321 of Code of Criminal Procedure. The argument of Mr. V.T. Gopalan that sub-Section (7) of Section 60 of POTA is in pari materia with sub-Section (2) of Section 195 of Code of Criminal Procedure, is totally unacceptable. Section 195 of Code of Criminal Procedure deals with prosecution for contempt of lawful authority of public servants and under sub-Section (2) of Section 195, the complaint lodge
servant can always be withdrawn by an authority superior to the said public servant and unless the trial in the Court of first instance has been concluded, the Court, on receipt of a petition for withdrawal of such superior authority, shall order withdrawal of the complaint.
This has got no application in prosecution under POTA. Only Section 321 of Code of Criminal Procedure is applicable in the instant case and in fact, that is the submission of Mr. K. Chandru, learn
counsel. That is also the understanding of the Review Committee in paragraph 46 of its order, which has already been extracted above. The words in sub-Section (7) of Section 60 of POTA, '...
pending against the accused shall be deemed to have been withdrawn from the date of such direction' shall have to be understood only in the context of Section 321 of Code of Criminal Procedure to mean that if the Review Committee forms an opinion that the prosecution under POTA against the accused respondents does not attract the provisions of POTA, appropriate directions can be issued to the Sta
and if the directions are in the nature of addressing the Public Prosecutor to withdraw the prosecution, then such a direction is binding on the State Government. But the said direction is not binding on the Public Prosecutor as, under Section 321 of Code of Cri
Procedure, he has to formulate his opinion on his independent application of mind and even if an application under Section 321 of Code of Criminal Procedure is filed, the ultimate arbiter is the Special
giving due consideration to the opinion of the Review Committee. Now, the Review Committee shall proceed further in the ligh
stated above.
16. The Writ Petitions are disposed of accordingly. No costs.
Consequently, W.P.M.P. Nos.1297 to 1299 of 2004 are closed.

(B.S.R., CJ) (Z.H., J)
04.02.2004
bh/
Internet : Yes
LR Entry : Yes